No. 68 Orig.

Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975
No. —— Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v.

STATE OF NEW JERSEY,
Defendant

MOTION FOR LEAVE TO FILE COMPLAINT
and
COMPLAINT
and
INTERROGATORY

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SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. —— Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v.

STATE OF NEW JERSEY,
Defendant

MOTION FOR LEAVE TO FILE COMPLAINT

Invoking the original and exclusive jurisdiction of this Court under the Constitution of the United States and 28 U.S.C. §1251 (a) (1), since this is a controversy between two States, the Commonwealth of Pennsylvania, by its Attorney General, respectfully requests leave to file its complaint against the State of New Jersey, which is submitted herewith.

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SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. —— Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v.

STATE OF NEW JERSEY,
Defendant

COMPLAINT

The Commonwealth of Pennsylvania by its Attorney General, Robert P. Kane, files this complaint and in support of it states:

1. The original and exclusive jurisdiction of the Supreme Court of the United States is invoked pursuant to Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251(a)(1) since this is a controversy between two states.

2. The Plaintiff, the Commonwealth of Pennsylvania, is a state of the United States and brings this action,

a. on behalf of itself and

b. as *parens patriae* on behalf of its citizens and residents.

3. The Defendant, the State of New Jersey, is a state of the United States.

4. The New Jersey Transportation Benefits Tax Act, N.J.S.A. 54; 8A-58 et seq. (hereinafter referred to as the "Act"), imposes a tax on nonresidents' New Jersey derived income when the nonresident of a state which is certified by New Jersey's Transportation Commissioner as a critical area state.

5. Plaintiff, Commonwealth of Pennsylvania, has been always certified as a critical area state.

6. The rate of taxation under the Act presently is 2%; however, the rate has always been adjusted to be exactly equivalent to the rate of taxation imposed by Pennsylvania pursuant to its income tax, Tax Reform Code of 1971, 72 P.S. §7301 et seq., which is a tax on all income earned in Pennsylvania.

7. The Act also imposes the tax upon New Jersey residents whose income is derived from a critical area state, N.J.S.A. 54:8A-59, but then exempts all such income to the extent it is taxed by such state, N.J.S.A. 54:88-94.

8. Since Pennsylvania, pursuant to the Tax Reform Code of 1971, 72 P.S. §7302(b), taxes its residents and New Jersey residents at a rate of 2% on income earned in Pennsylvania, New Jersey residents working in Pennsylvania are not taxed by New Jersey.

9. The domestic earned income of New Jersey residents is not taxed by New Jersey.

10. By reason of the operation of the Act, New Jersey taxes only the income of non-residents, or Pennsylvanians, working in New Jersey.

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. —— Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v.

STATE OF NEW JERSEY,
Defendant

INTERROGATORY

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant New Jersey, by an appropriate official, shall answer the following interrogatory, under oath, within 45 days of the date after service of the complaint and this interrogatory.

1. For fiscal years 1972, 1973, 1974 and 1975 state the amount of revenues New Jersey has collected or expects to collect from Pennsylvania residents pursuant to New Jersey's Transportation Benefits Tax Act.

(s) LAWRENCE SILVER

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., Clerk

In the Supreme Court of the United States

October Term, 1975

No. 68 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v.

STATE OF NEW JERSEY,
Defendant

PROPOSED AMENDED COMPLAINT

and

BRIEF IN SUPPORT OF PROPOSED AMENDED COMPLAINT

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1975

No. 68 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v.

STATE OF NEW JERSEY,
Defendant

PROPOSED AMENDED COMPLAINT

On July 25, 1975, the Commonwealth of Pennsylvania, by its Attorney General, Robert P. Kane, filed with this Court, a motion for leave to file complaint, complaint and interrogatory. Pursuant to Rule 9(2), Rules of the Supreme Court of the United States, which incorporates the Federal Rules of Civil Procedure, where appropriate, and pursuant to Rule 15(a) of the Federal Rules of Civil Procedure which provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . .", and upon notice of intention to file this proposed amended complaint given on August 25, 1975, to opposing counsel, the Common-

wealth of Pennsylvania, by its Attorney General, Robert P. Kane, files this proposed amended complaint in substitution for the complaint attached to its motion for leave to file complaint and in support of it states:

COUNT ONE—Declaratory and Injunctive Relief

1. The original and exclusive jurisdiction of the Supreme Court of the United States is invoked pursuant to Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251 (a) (1) since this is a controversy between two states.

2. Plaintiff, the Commonwealth of Pennsylvania, is a state of the United States and brings this action,

a. on behalf of itself and

b. as parens patriae on behalf of its citizens and residents.

3. Defendant, the State of New Jersey, is a state of the United States.

4. The New Jersey Transportation Benefits Tax Act, N.J.S.A. 54:8A-58 et seq. (hereinafter referred to as the "Act"), imposes a tax on nonresidents' New Jersey derived income when the nonresident of New Jersey is a resident of a state which is certified by New Jersey's Transportation Commissioner as a critical area state.

5. Plaintiff, Commonwealth of Pennsylvania, at all relevant times, has always been certified as a critical area state.

6. The rate of taxation under the Act presently is 2%, N.J.S.A. 54:8A-60; however, the rate has always been adjusted to be exactly equivalent to the rate of taxation imposed by Pennsylvania pursuant to its income tax, Tax Reform Code of 1971, 72 P.S. §7301 et seq., which is a tax on all income earned in Pennsylvania.

7. The Act also imposes the tax upon New Jersey residents whose income is derived from a critical area state, N.J.S.A. 54:8A-59, but then exempts all such income to the extent it is taxed by such state, N.J.S.A. 54:8A-94.

8. Since Pennsylvania, pursuant to the Tax Reform Code of 1971, 72 P.S. §7302 (b), taxes its residents and New Jersey residents at a rate of 2% on income earned in Pennsylvania, New Jersey residents working in Pennsylvania are not taxed by New Jersey.

9. The domestic earned income of New Jersey residents is not and, at all relevant times, has not been taxed by New Jersey.

10. By reason of the operation of the Act, New Jersey taxes only the income of nonresidents, or Pennsylvanians, working in New Jersey.

11. Pennsylvania, like all or nearly all other states which have a domestic earned income tax, permits a tax credit to any Pennsylvania resident for income taxes paid to other states, like New Jersey, Tax Reform Code of 1971, 72 P.S. §7314 (a).

12. During the fiscal years of 1972, 1973 and 1974, pursuant to the Act, New Jersey collected approximately $6,100,000.00, $11,600,000.00 and $12,000,000.00 respectively, and during the 1975 fiscal

year is expected to collect an amount in excess of $12,000,000.00, of which nearly all, if not all, was and will be collected from residents of Pennsylvania.

13. The levying and imposition of taxes by New Jersey pursuant to the Act violates the Constitution of the United States and more particularly the Privileges and Immunities Clause of Article IV, Section 2, Clause 1. The tax falls exclusively on nonresidents' income which was not offset, even approximately, by other taxes imposed upon residents alone. The Act also violates the Equal Protection Clause of the Fourteenth Amendment in that the Act makes a legislative classification without a rational basis.

14. Pennsylvania and those it represents are adversely affected by the Act. Pennsylvania has been improperly deprived of revenues totalling approximately $29,700,000.00. Pennsylvania is currently being deprived of revenues, and Pennsylvania's residents have been and are being deprived of governmental services which are not now funded or are under-funded because of the revenues Pennsylvania has not been able to collect.

COUNT TWO—Accounting and Repayment

15. The Act imposes criminal sanctions of up to a $1,000.00 fine and/or one year imprisonment for failure to file tax returns required by the Act and holds New Jersey employers liable for taxes that should have been withheld from their employees.

16. For each of the taxable years since 1971 and continuing until present, nonresident New Jersey taxpayers paid their tax due under the Act under the duress of criminal and civil penalties.

17. Prior to the passage of the Act, New Jersey's officials were aware and advised of the possible constitutional defects in the Act.

18. Shortly after the passage of this Act, New Jersey was on notice of the possible constitutional defects in the Act by the initial filing of, on December 6, 1971, the case of *Austin v. State Tax Commission,* 114 N.H. 137, 316 A.2d 165 (1974), *rev'd sub nom. Austin v. New Hampshire,* 420 U.S. 656 (1975).

19. Since March 19, 1975, the date that this Court decided the *Austin* case, New Jersey has been put on notice of the constitutional defects in the Act.

20. The net effect of the Act has been to divert to New Jersey taxes which would otherwise be collected by Pennsylvania causing the burden of the loss of funds collected pursuant to the Act to be borne entirely by Pennsylvania.

Wherefore, the Plaintiff, Commonwealth of Pennsylvania, respectfully requests that this Court:

(a) assume jurisdiction of this case;

(b) declare New Jersey's Transportation Benefits Tax Act unconstitutional;

(c) enjoin New Jersey from enforcing the Transportation Benefits Tax Act;

(d) order New Jersey to prepare and file a full accounting of all sums which have been collected from residents of Pennsylvania pursuant to the Transportation Benefits Tax Act;

(e) enter a money judgment in favor of Pennsylvania and against New Jersey in the amount of the sums which have been collected from residents of Pennsylvania pursuant to the Transportation Benefits Tax Act, together with interest on such sums compounded annually from the date of their collection by New Jersey to the date of repayment;

(f) enter an award of costs in favor of Pennsylvania and against New Jersey;

(g) grant such further and other relief as justice may require.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 68 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

v.

STATE OF NEW JERSEY

BRIEF IN SUPPORT OF PROPOSED AMENDED COMPLAINT

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JURISDICTION

Plaintiff, the Commonwealth of Pennsylvania, is a state of the United States, and brings this action in its sovereign capacity and as parens patriae on behalf of its citizens and residents, against the State of New Jersey, in its sovereign capacity, to have declared unconstitutional the New Jersey Transportation Benefits Tax Act, N.J.S.A. 54:8A-5 et seq., and to recover the tax funds diverted from the Commonwealth of Pennsylvania to the State of New Jersey because of the operation of the aforementioned Act. As such, this is an action over which this Court has original and exclusive jurisdiction under Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251 (a).

STATUTES INVOLVED

Selected portions of the following statutes are printed in the appendix.

1. New Jersey Transportation Benefits Tax Act, N.J.S.A. 54:8A-51 et seq.

2. New Jersey Emergency Transportation Tax Act, 54:8A-1 et seq.

3. New Jersey's Uniform Procedure Law, 54:50-1 et seq.

4. Pennsylvania's Tax Reform Code of 1971, 72 P.S. §7301 et seq.

QUESTIONS PRESENTED

1. Whether a New Jersey statute which taxes income of nonresidents earned in New Jersey but which does not tax income of residents earned in New Jersey violates the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution?

2. Whether a New Jersey statute which taxes income of nonresidents earned in New Jersey but which does not tax income of residents earned in New Jersey violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Whether the State of New Jersey, which has collected tax revenues pursuant to a statute whose unconstitutionality is clearly foreshadowed, should be required to account for and pay to the Commonwealth of Pennsylvania funds diverted from the Commonwealth's treasury to the State of New Jersey because of New Jersey's unconstitutional tax?

STATEMENT OF THE CASE

Plaintiff, Commonwealth of Pennsylvania, in its sovereign capacity and as parens patriae of its citizens and residents, brings this action before this Court to challenge the constitutionality of the New Jersey Transportation Benefits Tax Act, N.J.S.A. 54:8A-58 et seq. (the Act), and to redress direct injury to its governmental and proprietary interests.

The Act in question imposes a tax on nonresidents' New Jersey derived income when the nonresident of New Jersey is a resident of a state which is certified by New Jersey's Transportation Commissioner as a critical area state. Plaintiff, Commonwealth of Pennsylvania, at all relevant times, has been certified as a critical state area. Thus, residents of Pennsylvania who derive income from New Jersey are subject to the tax.

The Act also imposes a tax upon New Jersey residents whose income is derived from a critical state area, but then exempts such income to the extent it is taxed by such state. Furthermore, the domestic earned income of New Jersey residents is not and, at all relevant times, has not been taxed by the State of New Jersey.

Thus, by reason of the operation of the Act, New Jersey taxes only the income of nonresidents, or Pennsylvanians, working in New Jersey.

Since Pennsylvania, like all or nearly all other states which have a domestic earned income tax, permits a tax credit to any Pennsylvania resident for income taxes paid to other states, the net effect of the New Jersey tax is to divert to New Jersey tax revenues which would otherwise be collected by Pennsylvania.

SUMMARY OF ARGUMENT

By this action, Plaintiff, Commonwealth of Pennsylvania, in its sovereign capacity and as parens patriae of its citizens and residents, challenges the constitutionality of the New Jersey Transportation Benefits Tax Act, N.J.S.A. 54:8A-58 et seq., and seeks to redress direct injury to its governmental and proprietary interests, which injury was caused directly by New Jersey acting in its governmental capacity. This Court has original and exclusive jurisdiction over the controversy. The factual posture of this case, with few, if any, facts being subject to dispute, makes this Court's exercise of its original jurisdiction particularly appropriate.

The tax statute under consideration imposes a tax on Pennsylvania residents who earn income in New Jersey, but imposes no tax on New Jersey residents on income earned within New Jersey.

This statute violates the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Privileges and Immunities Clause precludes the imposition of substantially higher taxes upon citizens of other states than the taxes imposed by the taxing state upon its own citizens. The Equal Protection clause denies a state the power to legislate in a manner which classifies persons on a basis that

is not reasonably related to the objective of the statute. [1]

Plaintiff has a clear right to the relief sought—return of the funds collected by New Jersey under its unconstitutional tax scheme. First, Plaintiff is entitled to a retroactive application of a decision holding the New Jersey tax scheme unconstitutional. A holding of unconstitutionality would neither establish a new principle of law nor decide an issue of first impression. Furthermore, Defendant was keenly aware of the serious constitutional pitfalls of the tax scheme prior to its enactment. Second, the taxes were paid under duress and now are subject to recovery as a matter of general tax law. Even absent duress, the claim for recovery is well founded. Third, the baiance of the equities as between Plaintiff and Defendant weigh heavily in favor of ordering New Jersey to return that which it unlawfully collected in the first place.

Although it is impossible to fully compensate Plaintiff for Defendant's intentional depletion of its sources of revenue an award of interest in addition to the principal amount of taxes due is equitable. New Jersey law supports the recovery of interest.

[1] The Commonwealth of Pennsylvania adopts the Equal Protection arguments submitted in the briefs by and on behalf of Appellants in *Austin v. New Hampshire*, 420 U.S. 656 (1975).

ARGUMENT

I. PLAINTIFF HAS STANDING TO PROTECT ITS PROPRIETARY INTERESTS

The Supreme Court's original jurisdiction over suits between states rests upon Section 2 of Article III of the United States Constitution. Clause 1 of Section 2 places controversies among the states within the judicial power of the United States. "The judicial power shall extend . . . to controversies between two or more States. . . ." U. S. Const., art. III, §2. The second clause of this Section gives the Supreme Court original jurisdiction over such cases. "In all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction." Id.

Congress, acting pursuant to the authority thus ceded to the federal government, has declared that such original jurisdiction shall lie exclusively in the Supreme Court for cases between two or more states. "The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States. . . ." 28 U.S.C. §1251 (a) (1).

The Supreme Court's original and exclusive jurisdiction is to be exercised whenever the complaining state is suing for the protection of its own proprietary interests. *Texas v. Florida*, 306 U.S. 398 (1939); *North Dakota v. Minnesota*, 263 U.S. 365 (1923). This is particularly appropriate when the action com-

plained of can be attributed to the government of the defendant state. *Texas v. New Jersey,* 379 U.S. 674 (1965); *Louisiana v. Texas,* 176 U.S. 1 (1900).

Historically, Article III had been construed to permit a citizen of one state to file an action in the Supreme Court against another state. *Chisholm v. Georgia,* 2 U.S. 419 (1793); *Grayson v. Virginia,* 3 U.S. 320 (1796). However, the Eleventh Amendment to the United States Constitution was ratified in order to overturn the *Chisholm* ruling. *Cohens v. Virginia,* 19 U.S. 264 (1821); 1 C. Warren, *The Supreme Court in United States History,* 92-101 (1924). Thus, the Eleventh Amendment cannot be avoided, and original jurisdiction is not available, where a state sues in an action which really is brought on behalf of designated individuals. *Illinois v. Michigan,* 409 U.S. 36 (1972); *Arkansas v. Texas,* 346 U.S. 368 (1953); *Oklahoma ex rel. Johnson v. Cook,* 304 U.S. 387 (1938); *North Dakota v. Minnesota,* 263 U.S. 365 (1923); *New Hampshire v. Louisiana,* 108 U.S. 76 (1883).

The Eleventh Amendment does not bar suits which are brought to protect the genuine interests of a state.

> "The right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state." *North Dakota v. Minnesota,* 263 U.S. 365, 375-376 (1923).

The states lost their power to enforce claims for individual citizens, as a trustee in the Supreme Court, by ratifying the Eleventh Amendment. The states have retained their power to enforce claims in the Supreme Court against other states, for damage to their proprietary or governmental interests. *Virginia v. West Virginia,* 246 U.S. 565 (1918); *Rhode Island v. Massachusetts,* 37 U.S. 657 (1838); *New Jersey v. New York,* 30 U.S. 284 (1831).

To determine whether a state is the real party in interest, the Court must look to the effect of the judgment or decree which is sought. *Kansas v. United States,* 204 U.S. 331 (1907). Plaintiff seeks herein to recoup losses suffered by its state treasury due to New Jersey's direct diversion of tax dollars from Plaintiff's citizens. The effect of the relief sought by Plaintiff will be to reimburse its general state treasury for the tax revenues which were diverted by New Jersey.

In the first case which interpreted the impact of the Eleventh Amendment on original jurisdiction actions, this Court noted that only suits which could have been initiated by individual citizens prior to adoption of the Amendment were to be barred thereafter from prosecution by the states on behalf of such citizens. *New Hampshire v. Louisiana,* 108 U.S. 76, 91 (1883). In view of the interests which Plaintiff is seeking to protect and the nature of relief requested against Defendant, the case at bar presents the clearest example of a controversy between states, not individuals. First, the judgment sought will protect the sovereign interest of Plaintiff in its general state

treasury. Second, the funds recovered will be applied to Plaintiff's general governmental purpose of providing for the health, safety and welfare of its citizens. Third, the acts complained of were taken directly by the State of New Jersey, acting as a sovereign, through the New Jersey Legislature performing the governmental function of enacting a general revenue-raising measure. Fourth, Plaintiff does not seek relief from any particular individuals in the New Jersey government. Such relief might be appropriate were the taxes levied and collected pursuant to mal-administration of a statute or the wrongful acts of particular officials. In the case at bar, the taxes were collected in compliance with New Jersey law. Compare *Missouri v. Illinois,* 180 U.S. 208 (1901); *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907); *Louisiana v. Mississippi,* 202 U.S. 1 (1906); *Nebraska v. Iowa,* 406 U.S. 117 (1972).

In *South Dakota v. North Carolina,* 192 U.S. 286 (1904), the defendant state was ordered to pay $27,400 to South Dakota, plus costs of the suit, upon certain government bonds.

> "[I]t is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one state against another to enforce a property right. Chisholm v. Georgia [2 U.S. 419 (1793)], was an action of assumpit; United States v. North Carolina [136 U.S. 211 (1890)], an action of debt; United States v. Michigan [190 U.S. 379 (1903)], a suit for an accounting, and that which was sought in each was a money judgment against the defendant state." Id. at 318.

Plaintiff is seeking to recover damages for New Jersey's unconstitutional diversion of tax dollars from its state treasury to that of Defendant. As such, Plaintiff's claim is directly analogous to that presented in *Virginia v. West Virginia,* 238 U.S. 202 (1915) and 246 U.S. 565 (1918), where one state sought and won a money judgment against another. This case is also similar to the numerous instances where this Court has exercised its original jurisdiction to prevent the diversion of natural resources flowing from one state to another. *Arizona v. California,* 373 U.S. 546 (1963); *New Jersey v. New York,* 345 U.S. 369 (1953); *Nebraska v. Wyoming,* 325 U.S. 589 (1945); *Colorado v. Kansas,* 320 U.S. 383 (1943); *Wisconsin v. Illinois,* 309 U.S. 569 (1940); *Wyoming v. Colorado,* 298 U.S. 573 (1936); *Arizona v. California,* 298 U.S. 558 (1936); *Washington v. Oregon,* 297 U.S. 517 (1936); *Arizona v. California,* 283 U.S. 423 (1931); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Wyoming v. Colorado,* 259 U.S. 419 (1922).

In *Austin v. New Hampshire,* 420 U.S. 656 (1975), this Court held a New Hampshire tax statute violative of the Privileges and Immunities Clause because the statute imposed a tax on nonresidents which was not substantially equivalent to the taxes imposed on residents. The Attorney General of New Jersey in an amicus curiae brief in *Austin* recognized not only the similar effect of the New Jersey Transportation Benefits Tax Act and the New Hampshire tax statute reviewed in *Austin,* but also that the states

of Maine, Vermont and Massachusetts, which offered its residents a tax credit against the New Hampshire tax, were the one's who would benefit from the elimination of the New Hampshire tax, and thus these states, not its individual taxpayers, were the real parties in interest. Brief of the Attorney General of New Jersey as Amicus Curiae at 3, 6, *Austin v. New Hampshire,* 420 U.S. 656 (1975). Similarly, in the case at bar, the gain which may result from the elimination of the New Jersey Transportation Benefits Tax Act will inure to the benefit of the Commonwealth of Pennsylvania. Thus, the Commonwealth of Pennsylvania is the real party in interest.

The Commonwealth of Pennsylvania is properly before the Supreme Court seeking to protect its governmental interests which have been unlawfully abridged by the State of New Jersey.

II. THE SUPREME COURT IS THE PROPER FORUM

In a legitimate controversy between states over specific property interests, it is the responsibility of the Supreme Court to exercise its original jurisdiction and settle the question, since the states separately do not have the constitutional power to resolve the controversy. *Texas v. New Jersey,* 379 U.S. 674 (1965) (right to escheat debts owed by Sun Oil Company); *Western Union Tel. Co. v. Pennsylvania,* 368 U.S. 71 (1961) (right to escheat money orders); *Texas v. Florida,* 306 U.S. 398 (1939) (right to collect death

taxes). "Neither State can legislate for, or impose its own policy upon the other." *Kansas v. Colorado,* 206 U.S. 46, 95 (1907).

Placement of such responsibility in the Supreme Court reflects the historical purpose of the constitutional provision for original jurisdiction—to offer a method of settling disputes between sovereign powers, which disputes traditionally could be settled only by diplomacy or war. *Nebraska v. Wyoming,* 325 U.S. 589 (1945); *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945); *North Dakota v. Minnesota,* 263 U.S. 365 (1923).

The concept of sovereignty which underlies the instant case requires that this Court exercise its jurisdiction and resolve the dispute, by application of federal common law. See, *Kansas v. Colorado,* 206 U.S. 46 (1907). "[P]roceedings under this Court's original jurisdiction are basically equitable in nature. . . ." (*Ohio v. Kentucky,* 410 U.S. 641, 648 (1973)) and, in actions between states, neither the statutes nor the decisions of either state can be conclusive. "For the decision of suits between States, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require." *Connecticut v. Massachusetts,* 282 U.S. 660, 670 (1931). Accord, *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.,* 304 U.S. 92, 110 (1938).

The Supreme Court has the authority to enforce a decision which adjudicates the conflicting claims of two or more states. Such enforcement authority, including enforcement of a money judgment, is inherent in the constitutional provision for original and ex-

clusive jurisdiction over such controversies. *Virginia v. West Virginia,* 246 U.S. 565, 591 (1918).

Plaintiff's claim against New Jersey presents a clearly-defined, justiciable controversy, which is susceptible of enforcement under settled common law and equitable principles. At issue is the Plaintiff-State's right to a defined fund of tax collections. The evidence necessary to adjudicate the issues is all documentary in nature, so there can be little, if any, factual dispute.

Where a controversy between states is justiciable and the necessity for action by this Court is absolute, as in the case at bar, original jurisdiction is available. *Illinois v. Milwaukee,* 406 U.S. 91, 95 (1972); *Alabama v. Arizona,* 291 U.S. 286, 291 (1934); *Louisiana v. Texas,* 176 U.S. 1, 15 (1900).

III. PLAINTIFF HAS A CLEAR RIGHT TO RELIEF

The imposition of an unconstitutional tax by one state that falls, in effect, upon another state, gives rise to a right of recovery, as in any other instance where one state violates the legally protected interest of another state.

A. A Holding That the New Jersey Transportation Benefits Tax Act is Unconstitutional Should Be Applied Retroactively

This Court has employed a balancing approach to retroactivity looking at "the prior history of the rule

in question, its purposes and effect, and whether retrospective operation will further or retard its operation". *Lemon v. Kurtzman,* 411 U.S. 192, 199 (1973) (quoting *Linkletter v. Walker,* 381 U.S. 618, 629 (1965)). The criteria for determining retroactive or prospective application were set forth in *Chevron Oil Company v. Huson,* 404 U.S. 97, 106-107 (1971).

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' [citation omitted] Finally, we have weighed the inequity imposed by retroactive application for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' [citation omitted]".

Each of these considerations warrant the retroactive application of a decision holding the New Jersey Transportation Benefits Tax Act unconstitutional.

(1) *A Holding That the New Jersey Transportation Benefits Tax Act Is Unconstitutional Is Clearly Foreshadowed*

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), is a clear reminder that, in the absence of what is, in essence, a decision overturning a prior line of cases, retroactive application of a judgment is the rule, not the exception. In *Hanover Shoe* the plaintiff company won a treble damage antitrust action against the defendant for monopolization of the shoe machinery market. The period of limitation under the applicable statute commenced July 1, 1939. The suit was filed September 21, 1955. The Court of Appeals disallowed the district court's award of damages for the full period of limitations, holding instead that the focal point was June 10, 1946, the date on which the Supreme Court announced *American Tobacco v. United States*, 328 U.S. 781 (1946). In reversing the Court of Appeals, the Supreme Court held that *American Tobacco* had not fundamentally altered the law of monpolization.

> "The theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. . . . There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. . . .
>
> Neither the opinion in [United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945)] nor the opinion in American Tobacco indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 496 (1968).

The *Hanover Shoe* Court also set forth the criterion for a finding of novel doctrine, requiring that there be "such an abrupt and fundamental shift in doctrine as to constitute an entire new rule which in effect replaced an older one". Id. at 498.

A decision holding the New Jersey Transportation Benefits Tax Act unconstitutional would not constitute "an abrupt and fundamental shift in doctrine". Compare *Lemon v. Kurtzman*, 411 U.S. 192 (1973). In fact such a holding would not represent any shift in doctrine whatsoever, but would merely call for an application of long standing legal principles, *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Travis v. Yale and Towne Mfg. Co.*, 252 U.S. 60 (1920); *Shaffer v. Carter*, 252 U.S. 37 (1920); *Travellers Insurance Co. v. Connecticut*, 185 U.S. 364 (1902);

and *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), which principles have been recognized by New Jersey. Opinions of the Attorney General of New Jersey, F.O. No. 1, June 6, 1962.

Even though *Hanover Shoe* involved treble damages, the Court did not back away from the plain consequences of an absence of novel doctrine in *American Tobacco*:

> "In these circumstances, there is no room for argument that Hanover's damages should reach back only to the date of the American Tobacco decision. Having rejected the contention that Alcoa-American Tobacco changed the law of monopolization in a way which should be given only prospective effect, it follows that Hanover is entitled to damages for the entire period permitted by the applicable statute of limitations." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 (1968).

A decision holding the New Jersey Transportation Benefits Tax Act unconstitutional is so clearly foreshadowed that even the authors of this Act must have, by necessity, recognized the constitutional problems involved.

Although there appears to be no legislative history on the Tax Act in question, it will be instructive to examine the legislative history of the New Jersey Emergency Transportation Act of 1961. N.J.S.A., 54:8A-1 *et seq.* This Act is similar in effect to the Act under consideration in that it imposes on residents of New York who derive income from New Jersey a commuters tax at a rate which is geared to the New

York tax structure. At the same time this Act excludes New Jersey residents from the tax. N.J.S.A., 54:8A-16. Thus, the effect of the Emergency Transportation Tax Act of 1961, as with the Act under consideration, is to exempt residents from a tax to which nonresidents are subject. Day, *Taxing Interstate Commuters, A New Jersey Experiment Under The United States Constitution,* 18 Rutgers L. Rev. 1 (1963). Not only is the effect of these two Acts similar but also the form and purpose of the two Acts bear a remarkable resemblance to one another. New Jersey, by its own admission, has recognized the similarities in the two tax Acts. Brief of the Attorney General of New Jersey as Amicus Curiae at 1-2, *Austin v. New Hampshire,* 420 U.S. 656 (1975).

In view of the similarities between the two tax Acts discussed above, it seems only reasonable to conclude that the earlier Act was used as a model for the latter. and, that the legislative history of the former reflects the considerations which the legislature dealt with prior to enacting the latter.

The public hearing held on May 20, 1960, before the New Jersey Assembly Appropriations Committee is replete with references to the possible unconstitutional effect of the Emergency Transportation Tax Act of 1961. *Hearing on Assembly Bill No.* 65 *Before the New Jersey Assembly Appropriations Committee* (1960). Some of the more preceptive comments concerning this proposed tax were made by Mrs. Kenneth D. Smith on behalf of the League of Women Voters. In her statement to the Committee opposing the proposed Act, Mrs. Smith noted the fact that the Act was a mere "tax gimmick" and that there

was a "serious question of the constitutionality of the tax". Id. at 24-25. Mrs. Smith suggested that the tax Act, if passed, would be regarded as a hostile act by New York and took note of the fact that restraint and cooperation are important in relations between states and that retaliation tends to breed retaliation. These considerations go to the very heart of the Privileges and Immunities Clause. *Austin v. New Hampshire*, 420 U.S. 656 (1975).[2]

Thus, New Jersey's own records demonstrate an awareness of the constitutional pitfalls of the Tax Act under review and the risk the state was taking in adopting it. Furthermore, shortly after the passage of the Transportation Benefits Tax Act, New Jersey was on notice of the possible constitutional defects in the Act by the filing of, on December 6, 1971, *Austin v. State Tax Commission*, 114 N.H. 137, 316 A. 2d 165 (1974), *rev'd. sub nom. Austin v. New Hampshire*, 420 U.S. 656 (1975).

By prior precedent and by New Jersey's own awareness a decision holding the Transportation Benefits Tax Act unconstitutional is "clearly foreshadowed" and such a holding should be retroactively applied.

[2] For other references to the possible unconstitutional effect of the Emergency Transportation Tax Act, see Hearings on Assembly Bill No. 65, supra, at 28, and memorandum attached as exhibit to hearing.

(2) *There Is No Inequity To Be Imposed by Retroactive Application of a Decision Holding the New Jersey Transportation Benefits Tax Act Unconstitutional*

The inequities suggested in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), and *Lemon v. Kurtzman*, 411 U.S. 192 (1973), are basically problems of third-party reliance, such as this Court addressed in *Cipriano v. Houma*, 395 U.S. 701 (1969), and *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

In both *Cipriano* and *Phoenix*, this Court refused retroactive application because of substantial reliance on a long standing practice.

Here, there is no long standing past practice, but rather one illegal tax scheme which is the first of its kind with respect to residents of Pennsylvania. If New Jersey did rely on the constitutionality of their novel tax, it was at their peril. Certainly, no one has undertaken specific agreements with New Jersey in expectation of receipts from the Transportation Benefits Tax, at least insofar as that might be reflected in the public laws or the history of the Act.

The requirement to pay back the total amount levied under the tax may create a fiscal burden for New Jersey, as it was designed to and did, in fact, create a burden for Plaintiff. The present question, however, is who should bear the responsibility of that fiscal burden—the state which imposed and collected the unconstitutional tax or the state whose treasury was drained unlawfully. It would be in-

appropriate for New Jersey to win the retention of such gains on grounds that their return would cause financial hardship, when their collection has caused financial hardship to Plaintiff.

During the period of the imposition of the Transportation Benefits Tax, Plaintiff-State has had to look to other sources of revenues, in an amount that is necessarily the same principal amount as that diverted by New Jersey. To allow New Jersey to escape repayment, on the theory that there would be some disruption to its fiscal expectation, would encourage other states to adopt similar predatory tax measures without regard to constitutional niceties, since a judgment of invalidity, when finally obtained, would only operate *in futuro*.

At a time when all states of the Union are subjected to unusually severe fiscal problems, a decision against retroactivity here would encourage further legislative adventurism.

B. Plaintiff Should Not Be Penalized

Theoretically, Plaintiff could have reduced or avoided the losses by revoking its tax credit laws or by enacting retaliatory laws. However, Plaintiff should not be denied recovery for failure to take such action.

This Court has long maintained that states should not attempt to correct discrimination against their citizens by retaliation. Avoidance of such retaliation

"was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis v. Yale and Towne Mfg. Co.*, 252 U.S. 60, 82 (1920). If a decision holding the tax unconstitutional is not applied retroactively, Plaintiff, Commonwealth of Pennsylvania, will be punished for failing to take retaliatory action, either through revoking tax credits for its own residents or attempting to increase tax burdens imposed on those New Jersey residents and businesses who derive income within the Commonwealth of Pennsylvania.

Mr. Justice Blackman, dissenting in *Austin*, might suggest that Plaintiff's losses could have been avoided simply and easily, through denial of tax credits to its residents who pay taxes to New Jersey. This suggestion does not take into consideration the Equal Protection and Privileges and Immunities problems that would likely ensue if Plaintiff, in the instant case, were to deny the benefits of the tax credit only to those residents who pay taxes in New Jersey. Furthermore, this suggestion does not take account of the long history and importance of tax credits in the Federal structure. Currently, 40 states impose general income taxes. *CCH State Tax Guide* (All States Unit) ¶15-000 at 1531-34. All of these states allow a credit against taxes otherwise payable to them, for taxes actually paid by their residents to other states. Id. at 1543. In this way, Plaintiff is consistent with almost all, if not all, of its sister states.

It should not be necessary to enact a discriminatory statute in order to gain relief from a sister state's discriminatory statute. To date, this Court

has offered an effective and appropriate means for resolution of such a situation. Plaintiff refused to back away from the normal pattern of tax laws and exercised restraint in not taking retaliatory action against New Jersey or against its residents who earn incomes in Pennsylvania. Such restraint should not now become a bar to Plaintiff's recovering for losses caused by the illegal New Jersey tax.

C. The Taxes Were Paid Under Duress

An old rule of common law held that: "One who voluntarily pays a tax imposed by an unconstitutional law, without knowing that the law is unconstitutional, cannot recover the amount so paid." *Prescott v. Memphis,* 154 Tenn. 462, 285 S.W. 587 (1926). To the extent that this rule is still good law, it underscores the propriety of Plaintiff's claim for relief in the instant case.

Initially, courts required proof of actual duress, which was interpreted as actual or impending restraint of person or property, in order to find sufficient involuntariness in tax payments to allow recovery of taxes paid and later deemed illegal or excessive. Thus, this Court held in *Radich v. Hutchins,* 95 U.S. 210, 213 (1877):

> "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making the payment."

This doctrine continued through *Union Pac. R.R. Co. v. Bd. of County Comm'rs.,* 98 U.S. 541 (1879); *Little v. Bowers,* 134 U.S. 547 (1890); and *Chesebrough v. United States,* 192 U.S. 253 (1904).

The old rule began to change in *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor,* 223 U.S. 280 (1912). In that case Mr. Justice Holmes stated the general principle that a taxpayer may recover taxes paid under the threat of the state's exercise of a summary statutory remedy providing penalities for nonpayment of the tax.

> "It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left. Of course we are speaking of those cases where the State is not put to an action if the citizen refuses to pay. In these latter he can interpose his objections by way of defense, but when, as is common, the State has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made. But even if the State is driven

> to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional rights, by defence in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms." *Atchinson, Topeka & Santa Fe Ry. Co. v. O'Connor,* 223 U.S. 280, 285-86 (1912).

The complete break with the past and acceptance of the doctrine of implied duress, where business disruption or penalties could be anticipated for failure to pay taxes, was made in *Ward v. Love County,* 253 U.S. 17 (1920). There, the Court specifically stated that the strict views it had taken in such cases as *Union Pac. R.R. Co. v. Bd. of County Comm'rs.,* 98 U.S. 541 (1879), had been modified by later cases.

The law of New Jersey on the question of when an individual may recover payments made which were not legally enforceable closely resembles the law as discussed through the cases cited above. In *Messner v. Union County,* 34 N.J. 233, 167 A. 2d 897 (1961), for example, the court held that where an individual under a mistake of law, but with full knowledge of the facts, voluntarily pays money on a demand not legally enforceable against him or her, the payments made cannot be recovered absent unjust enrichment, fraud, duress, or improper conduct on the part of the payee; and, in *Flammia v. Maller,* 66 N.J. Super. Ct. 440, 169 A. 2d 488 (1961), the court held that a mistake of law occurs where a person is truly

acquainted with the existence or nonexistence of facts, but is ignorant or comes to an erroneous conclusion as to their legal effect. The case under consideration presents a situation where residents of Pennsylvania, with knowledge of the fact that New Jersey imposed a tax on New Jersey derived income, paid the tax without realizing its invalidity. Thus, the New Jersey income tax, imposed on Pennsylvania residents, was paid under a mistake of law, and can be recovered where there is a showing of unjust enrichment, fraud, duress or improper conduct on the part of the payee. It is submitted that the recovery of the tax is justified on the basis that the tax payments were made under duress and if retained would cause unjust enrichment.

A good discussion of the question of when payments are voluntarily made as opposed to being made under duress can be found in *Miller v. Eisele,* 111 N.J.L. 268, 168 A. 426 (1933). Throughout the court's discussion of this question, continual emphasis was given to the notion that to constitute a voluntary payment the party making the payment must have had the freedom of exercising his or her will, and that when one acts under *any* species of compulsion the payment is not voluntary. The standard adopted in *Miller* to determine when payments are voluntarily made or made under duress is consistent with the concept of implied duress as articulated by Mr. Justice Holmes in *Atchison Topeka & Santa Fe Ry. Co. v. O'Connor,* supra.

One of the more telling features of the New Jersey Transportation Benefits Tax Act is that the payment

of taxes is a necessary condition of employment. Under Section 12 of the Act (N.J.S.A., 54:8A-101) an employer is required to withhold from each payroll period an amount computed in such a manner as to result, as far as practicable, in a sum substantially equivalent to the amount of tax reasonably estimated to be due. This withholding requirement does not allow a taxpayer any freedom of choice in terms of whether or not to pay the tax, and, as indicated in *Miller* and *Atchison*, freedom of choice is the touchstone for determining duress. The effect therefore, of the automatic withholding tax is that the payments are not voluntary, but are made under duress.

Other forms of duress effected by the Act are as follows: (1) The failure to pay the taxes, fees, interest, and penalties imposed under the Act amounts to a personal debt of the taxpayer to the State of New Jersey, and such debt, whether sued upon or not, constitutes a lien on all of the property of the debtor except as may be provided to the contrary by law. N.J.S.A., 54:49-1; (2) Individuals face fines up to $1,000 or imprisonment of up to one year for failure to file the returns as required under the Act, N.J.S.A., 54:8A-97; 54:52-1; (3) Employers are liable for any taxes that should have been withheld N.J.S.A. 54:8A-103 and could be subject to criminal prosecution for failing to accurately report withholdings. N.J.S.A., 54:52-1. When these forms of duress are considered together with the automatic withholding tax it is clear that the payments made under the New Jersey Transportation Benefits Tax Act are inherently made under duress.

It is self-evident that the State of New Jersey will be unjustly enriched if it is not required to give restitution for the taxes that it has illegally collected. The failure to give restitution in cases analogous to the one under consideration has been justified on the grounds that the person receiving the payments has relied on their being available for use, and, having so relied, should be protected. It is submitted that in balancing the equities in the present case, this Court should not have such a tender regard for the wrongdoer, i.e. the State of New Jersey. Relief by way of restitution neither places an undue burden on the wrongdoer, nor subjects the wrongdoer to damages. Restitution in the case at bar merely calls upon the wrongdoer to give back that which it unlawfully forced from those residents of Pennsylvania who derive income from New Jersey. *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Cipriano v. Houma*, 395 U.S. 701 (1969); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

A formal or informal protest is not necessary where an invalid tax is assessed and paid under duress. *Koewing v. Town of West Orange*, 89 N.J.L. 539, 99 A. 203 (1916); *Miller v. Eisele*, 111 N.J.L. 268, 168 A. 426 (1933). Where the validity of a tax is attacked, the normal protest and abatement processes are neither required nor appropriate. Instead, the taxpayer's remedy is a direct resort to the courts under common-law doctrines of law and equity, as is being pursued in this case. *District of Columbia v. Brady*, 288 F.2d 108 (D.C.C.A. 1960).

Because of various provisions of the New Jersey Transportation Benefits Tax Act, the tax payments made under the Act are inherently made under duress. Furthermore, the failure to grant restitution will result in unjust enrichment to the State of New Jersey. In view of these factors, Plaintiff's right to recover tax monies illegally collected is supported by precedent established by this Court as well as by New Jersey courts.

D. Plaintiff Is Entitled to Relief, Even Absent Duress

Having shown that duress was inherent in the imposition and enforcement of the Transportation Benefits Tax Act, we must emphasize that proof of duress (or implied duress) should not be required as a prerequisite for recovery in this case. *Mayor of Jersey City v. O'Callaghan*, 41 N.J. Law 349 (1879). In *O'Callaghan* the court ordered Jersey City to return tax payments illegally collected, but voluntarily paid. In rejecting the rule that voluntary payment of an illegal tax bars recovery, the court stated that,

> "[p]rinciples of law, when intelligently applied, do not lead, as their sole product, to an inequitable result; and nothing but injustice would be served by an admission of the doctrine that where a tax has been adjudged to be illegal, the moneys unjustly collected under it can be retained. It is said in the brief of counsel for plaintiffs in error that the opposite rule is a hard one for cities, but the conclusive answer to this is that it is the rule of honest dealing; and the legal system would seem much out of joint that would permit the retention of moneys after a judicial decision that the person with whom they were lodged had no right to them." 41 N.J. Law at 351.

The rationale of *O'Callaghan* points out the soundness of the rule authorizing recovery of tax payments demanded and received by the public without right, notwithstanding the fact that such payments were voluntarily made.

The common-law rule denying recovery of illegal taxes which were voluntarily paid had a rationale based on four points: (1) principles of sovereign immunity; (2) the difficulty of determining the class of persons harmed; (3) the futility of granting recovery, since the successful plaintiffs, as taxpayers of the defendant's jurisdiction, would have to absorb the cost of a judgment; and (4) the personal liability of local assessors to repay illegal taxes, which led courts to charge both assessors and taxpayers with knowledge of the law at time of payment. See generally, *San Francisco & N.R. Co. v. Dinwiddie*, 13 Fed. 789 (Cal. Cir. 1882); *Dupre v. Opelousas*, 161 La. 272, 108 So. 479 (1926).

These historical factors are not applicable to the case at bar.

(1) There is no sovereign immunity here. Sovereign immunity as against another state was relinquished by ratification of the United States Constitution, when the states, through Article III, §2, effectively consented to suits by other states. *Principality*

of Monaco v. Mississippi, 292 U.S. 313, 328 (1934); *Virginia v. West Virginia,* 246 U.S. 565 (1918).

(2) There is no difficulty determining who has been harmed by New Jersey's actions. But for the New Jersey tax, the Commonwealth of Pennsylvania would have had approximately $29.7 million in additional funds for its state treasury.

(3) Unlike the common-law cases, a judgment allowing recovery would result in the Defendant, not the successful Plaintiff, absorbing the costs of a judgment. Such a result is possible as the party unjustly enriched by the illegal tax and the party harmed by the illegal tax are clearly identifiable and separate.

(4) There is no intimation that individual tax assessors may incur liability. This is a matter between states and this Court has the authority to impose a judgment upon and to require payment from the Defendant State. *Virginia v. West Virginia,* 246 U.S. 565 (1918).

In view of the above, there is no requirement that the payments involved be determined involuntary for Plaintiff to recover.

IV. PLAINTIFF IS ENTITLED TO INTEREST

New Jersey has long recognized that interest should be paid on taxes which were wrongfully collected. A case directly on point is *Mayor of Jersey City v. O'Callaghan,* 41 N.J. Law 349 (1879). In

O'Callaghan a municipality made assessments against the plaintiff's property because of certain benefits accruing to the property because of sewer construction. A second taxpayer, i.e. one other than plaintiff, successfully challenged the legality of the assessment. Subsequent to this challenge and the resulting court decision holding the assessment to be illegal, the municipality then started a second assessment proceeding against the plaintiff with the result that the second assessment levied was $1,000 less than the previous one which the plaintiff had paid. The plaintiff sued to recover the difference between the first and second assessment and asked for interest on the difference. The court granted the plaintiff's request for relief, and allowed interest on the theory "that the money paid on the first assessment was without right and that the municipality had the constant duty to return the debt without demand". *Hahne Realty Co. v. Newark,* 119 N.J.L. 12, 194 A. 191, 192 (1937).

Our research reveals that *O'Callaghan* is the only New Jersey case which directly deals with the question of whether or not interest can be recovered on taxes paid under a statute which is declared to be illegal. However, the importance of the *O'Callaghan* rule has been emphasized in a number of cases where a taxpayer made an overpayment and sought a refund plus interest on the overpayment. In such cases the courts have denied interest and have distinguished *O'Callaghan* on the basis that the question presented did not involve an assessment which was void or illegal, but rather the dispute was addressed to the amount of the tax assessed. *Hahne Realty Co. v. Newark,* 119 N.J.L. 12, 194 A. 191 (1937); *Safeway*

Trails, Inc. v. Furman, 77 N.J. Super. 26, 185 A.2d 245 (1962). The fact that *Hahne* and *Furman* did not extend *O'Callaghan* to cases involving tax overpayments shows the vitality of *O'Callaghan* to cases involving taxes paid under an illegal statute.

The policy considerations which support the *O'Callaghan* decision are aptly stated in *Boston & Maine R. Co. v. State,* 63 N.H. 571, 573, 4 Atl. 571, 572 (1886):

> "It is not just that a taxpayer should be compelled to bear more than his share of the public expense. He would bear more than his share if he lost and the public gained a year's use of an excess paid by him. It could not have been the intention to impose an unjust loss of a year's interest. Justice requires that there should be an equitable adjustment of that loss. In actions at common law, involving like questions, interest would be allowed as part of the damages, and we think it should be in this case."

In view of the *O'Callaghan* decision, the vitality that other New Jersey cases have imputed to that decision, and the legitimate policy considerations supporting the decision, it is submitted that Plaintiff is entitled to recover both the principal amount of tax revenues illegally diverted to New Jersey and the interest thereon.

CONCLUSION

Plaintiff, Commonwealth of Pennsylvania, is the party which suffered the loss on account of the New Jersey Transportation Benefits Tax Act, and thus has standing to maintain this action as the real party in interest. As this case is a controversy between two states, this Court is the proper forum to hear the case.

In view of *Austin,* the New Jersey Transportation Benefits Tax Act should be declared unconstitutional. A holding that the Act is unconstitutional should be applied retroactively to allow the requested relief, as such a holding would not deviate from past decisions, as there is no third-party reliance involved, and as retroactive application would further the principles of equal treatment and non-retaliation upon which *Austin* was based. Under normal tax law doctrines, Plaintiff is entitled to recover the sums diverted from its state treasury, together with interest thereon.

Both the sums involved and the legal issues to be resolved are of significant importance. Plaintiff's motion for leave to file complaint should be granted or, in the alternative, this Court should summarily grant the relief requested by Plaintiff, based on the pleadings and briefs submitted.

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APPENDIX

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APPENDIX

NEW JERSEY TRANSPORTATION BENEFITS TAX ACT

54:8A-59. Imposition of tax; levy; collection; payment

A temporary tax is hereby imposed, and shall be levied, collected and paid annually, at the rate specified in this act,

(a) upon every resident of this State, who is not a resident of another critical area state under and pursuant to its laws, upon and with respect to the entire taxable *classes of* income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within a critical area state other than New Jersey; and

(b) upon and with respect to the entire taxable *classes of* income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within this State by natural persons who are not residents of this State and who are residents of another critial area state under and pursuant to the law of such state.

54:8A-60. Rate of tax

The tax imposed by this act shall be levied and imposed annually upon each taxpayer at the rate of 2.8% *2.9%* upon each of the classes of income hereinafter enumerated in section 16 (C. 54:8A-73).

54:8A-94. Income taxes imposed by other states

(a) A resident taxpayer shall be allowed a credit against the tax otherwise due under this act for the amount of any income tax, wage tax or tax on or measured by gross or net earned or unearned income imposed on him by another state with respect to income which is also subject to tax under this act;

(b) The credit provided under this section shall not exceed the proportion of the tax otherwise due under this act that the amount of the taxpayer's taxable income subject to tax by the other jurisdiction bears to his entire taxable income.

54:8A-97. Returns; of whom required; personal liability; report of changes

(a) On or before the filing date prescribed in section 411 of this act, an income tax return shall be made and filed by or for every individual having a gross income derived from sources within his source state in excess of the sum of his personal exemptions allowed in section 25 of this day or having any items of tax preference derived from ar connected with New Jersey sources. . . .

54:8A-101. Employer to withhold tax

(a) General.

From and after *January 1, 1972*, the first day of the first month following at least a full calendar month after the enactment of this act; every employer in this State of a taxpayer subject to tax in respect of wages, salaries or commissions derived from sources within this State shall deduct and withhold upon the same for each payroll period an amount computed in such

manner as to result, as far as practicable, with due regard to the personal exemptions and standard deduction allowable under this act, in withholding during each calendar year a sum substantially equivalent to the amount of tax reasonably estimated to be due under this act. Methods for determining the amount to be withheld shall be prescribed by regulation, as shall procedures and requirements for the furnishing of written exemption certificates to the employer, the amending or substitution of the same, the furnishing by the employer of written statements showing the total compensation, the amount withheld and other specified information.

54:8A-103. Employer's liability

Every employer required to deduct and withhold tax under this act is hereby made liable for such tax. For such purposes any amount required to be withheld and paid over to the Division of Taxation shall be considered the tax of the employer. Any amount of tax actually deducted and withheld under this act shall be held to be a special fund in trust for the Division of Taxation. No employee shall have any right of action against his employer in respect to any moneys deducted and withheld from his wages and paid over to the Division of Taxation in compliance or in intended compliance with this act.

54:8A-104. Tax not to be collected from employer on payment; liability for penalties; interest; failure to pay tax withheld

(a) If an employer fails to deduct and withhold tax as required, and thereafter the tax against which

such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(b) If any employer shall fail to make a return and pay a tax withheld by him at the time required by or under the provisions of this act, such employer shall be liable for such tax and shall pay the same together with all penalties and interest charges thereon as provided in the case of any taxpayer under section 48 of this act,[1] and such additional amount of penalties and interest shall in no case be charged to or collected from the taxpayer by said employer. The Division of Taxation shall have the same rights and powers for the collection of such tax, penalties and interest against such employer as are now prescribed by this act for the collection of a tax against a taxpayer.

54:8A-105. Penalties; interest; abatement or remission

Any taxpayer who shall fail to file his return when due shall be liable to a penalty of $2.00 for each day of delinquency, which penalty shall be payable to, and recoverable by, the Division of Taxation as a part of the tax herein imposed. If any tax be not paid when the same becomes due, as herein provided, there shall be added to the amount of the tax a sum equivalent to 5% thereof, as a penalty, and, in addition thereto, interest at the rate of 1% per month or fraction thereof from the date the tax became due

until the same be paid. If the Division of Taxation determines that the failure to comply with any provision of this act was excusable under the circumstances, it may abate or remit such part or all of the penalty as shall be appropriate under such circumstances.

54:8A-114. Controlling statute; exception

The taxes imposed by this act shall be governed in all respects by the Divisions of the State tax uniform procedure law (subtitle 8 of Title 54 of the Revised Statutes) fn. 1 except only to the extent that a specific provision of this act may be in conflict therewith.

NEW JERSEY EMERGENCY TRANSPORTATION TAX ACT

54:8A-2. Imposition of tax; levy; collection; payment; exemption

A temporary emergency tax is hereby imposed, and shall be levied, collected and paid annually, at the rates specified in this act;

(a) Upon every resident of this State, who is not a resident of another critical area state under and pursuant to its laws, upon and with respect to the entire net income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within a critical area state other than New Jersey; and

(b) Upon and with respect to the entire net income as defined in this act and subject to taxation under this act, for the taxable year, derived from sources within this State by natural persons who are not residents of this State and who are residents of another critical area state under and pursuant to the law of such state.

(c) Notwithstanding the foregoing, for taxable years beginning on or after January 1, 1972 no tax shall be payable under section 6(c) (C.54:8A-6(e)) by:

(1) Any individual whose *entire* gross income for the taxable year is $2,500.00 or less, provided such individual is not married nor the head of a household nor a surviving spouse;

(2) Any head of a household or surviving spouse whose *entire* gross income for the taxable year is $5,000.00 or less; and

(3) Any husband or wife whose *entire* gross income for the taxable year, determined jointly, is $5,000.00 or less, or the aggregate of whose gross income for the taxable year, determined separately, is $5,000.00 or less.

54:8A-16. Credits for tax imposed by another critical area state

(A) (1) A nonresident of this State shall be allowed a credit against the tax otherwise due under this act for any income tax imposed for the taxable year by another critical area State, of which the taxpayer is a resident but such credit shall not exceed either:

(a) the percentage of the other tax determined by dividing the portion of the taxpayer's income subject to taxation under this act which is also subject to the other tax by the total amount of his income subject to such other tax, or

(b) the percentage of the tax otherwise due under this act, determined by dividing the portion of the taxpayer's income subject to taxation under this act which is also subject to the other tax by the total amount of the taxpayer's income which is taxable under this act.

(2) No credit shall be allowed under this section unless the jurisdiction of which the taxpayer is a resident:

(a) grants a substantially similar credit to residents of this State, or

(b) imposes an income tax on its own residents with respect to income derived from this State, and exempts from income tax the income of residents of this State.

(B) A resident of this State shall be allowed a credit against the tax otherwise due under this act for any income tax imposed for the taxable year by another critical area State, upon income both derived therefrom and subject to tax under this act.

(1) The credit allowable under this subsection shall not exceed the percentage otherwise due under this act determined by dividing the portion of the taxpayer's income subject to taxation by such other jurisdiction by the total amount of the taxpayer's income subject to taxation under this act.

(2) The credit allowable under this subsection shall not reduce the tax otherwise due under this act to an amount less than would have been due if the income subject to taxation by such other jurisdiction were excluded from the taxpayer's income subject to tax under this act.

(3) No credit shall be allowed under this subsection for a tax of a jurisdiction which allows residents of this State a credit against the taxes imposed by such other jurisdiction for the tax under this act, if such other credit is substantially similar to the credit granted to nonresident taxpayers by subsection (A) of this section.

NEW JERSEY UNIFORM PROCEDURE LAW

54:49-1. Tax a debt and lien; preference; proceeds paid to commissioner

The taxes, fees, interest and penalties imposed by any such State tax law, or by this subtitle, from the time the same shall be due, shall be a personal debt of the taxpayer to the State, recoverable in any court of competent jurisdiction in an action in debt in the name of the State. Such debt, whether sued upon or not, shall be a lien on all the property of the debtor except as against an innocent purchaser for value in the usual course of business and without notice thereof, and except as may be provided to the contrary in any other law, and shall have preference in any distribution of the assets of the taxpayer, whether in bankruptcy, insolvency or otherwise. The proceeds of any judgment or order obtained hereunder shall be paid to the commissioner.

54:52-1. Failure to file report; filing of false or fraudulent report

Any person who shall fail to file any report required to be filed pursuant to the provisions of any state tax law, or shall file or cause to be filed with the commissioner any false or fraudulent report or statement, or shall aid or abet another in the filing with the commissioner of any false or fraudulent report or statement, with the intent to defraud the state or evade the payment of any tax, fee, penalty or interest or any

part thereof, which shall be due pursuant to the provisions of this subtitle, or to any state tax law, shall be guilty of a misdemeanor and be fined not to exceed one thousand dollars or be imprisoned not to exceed one year, or both, at the discretion of the court.

PENNSYLVANIA TAX REFORM CODE OF 1971, ACT OF AUGUST 31, 1971, SECTION 3, P. L. 362, No. 93 (72 P.S. §7301 ET SEQ.)

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§7302. Imposition of tax

(a) There is hereby imposed an annual tax to be paid by resident individuals, estates or trusts at the rate of two per cent on the privilege of receiving each of the classes of income hereinafter enumerated in section 303.[1]

(b) There is hereby imposed an annual tax to be paid by nonresident individuals, estates or trusts at the rate of two per cent on the privilege of receiving each of the classes of income enumerated in section 303 from sources within this Commonwealth.

§7314. Income taxes imposed by other states

(a) A resident taxpayer before allowance of any credit under section 312[1] shall be allowed a credit against the tax otherwise due under this article for the amount of any income tax, wage tax or tax on or measured by gross or net earned or unearned income imposed on him by another state with respect to income which is also subject to tax under this article.

(b) The credit provided under this section shall not exceed the proportion of the tax otherwise due under this article that the amount of the taxpayer's income subject to tax by the other jurisdiction bears to his entire taxable income.

Supreme Court, U. S.
FILED
OCT 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 68 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

v.

STATE OF NEW JERSEY,
Defendant.

On Motion for Leave to File Original Action

BRIEF IN OPPOSITION

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Defendant.

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BRIEF IN OPPOSITION

Counter-Statement of Question Presented

Does the original jurisdiction of the Supreme Court extend to a challenge by a state to the tax laws of another state on the grounds that those laws infringe upon the federal constitutional rights of some residents of the plaintiff state?

Counter-Statement of the Case

Located between two huge metropolitan areas, Philadelphia and New York City, New Jersey has been aptly referred to as a "bedroom community" and as a "corridor state". Each working day over four hundred thousand commuters, exceeding by far the number of interstate commuters for any other state, traverse the two large rivers separating New Jersey from Pennsylvania and New York.* The limited number of available river crossings and the vast number of interstate commuters have led to unparalleled interstate transportation problems. These interstate transportation problems are undoubtedly more substantial than those of any other state in the Union.**

---

* Including New Jersey residents who work in other states and residents from other states who commute to New Jersey, it is estimated that each day over 281,000 people commute to work between New York and New Jersey, and that over 164,000 people commute between Pennsylvania and New Jersey.

** The New Jersey Legislature took cognizance of these problems in the preamble to the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1, *et seq.*):

> "Whereas, Metropolitan areas in the United States and particularly in this State and the States bordering it, have grown and become established without regard to the boundary lines of separate States; and
>
> "Whereas, Such growth and establishment have brought about the creation of actual regions within which patterns of activity have developed which have given rise to and increased the degree of the practice of maintaining a place of residence in 1 State and a place of employment in another, also without regard to the boundary lines of separate States; and

(Footnote continued on following page)

These interstate transportation problems have necessitated the creation of several bi-state agencies.* However, these agencies are only able to deal with limited interstate transportation problems involving the operation of bridges and tunnels. The primary interstate transportation problems, such as the operation of mass transit buses and trains, must be borne by the State of New

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(Footnote continued from preceding page)

> "Whereas, These conditions have given rise to extremely complex problems, culminating in a severe transportation crisis, particularly in the providing of necessary and appropriate facilities and services for the transportation of persons living within 1 State and employed within another; and
>
> "Whereas, Extensive studies conducted over many years have demonstrated that efforts of great magnitude are required to meet the need for appropriate facilities and services for transportation within metropolitan regions, and that such efforts will require substantial funds for their financing; and
>
> "Whereas, Due to the existence of great rivers at the State boundaries, which are obstacles to the movement of land vehicles, the cost of the interstate portions of transportation facilities and services for any kind of land vehicle is massively greater than the cost of connecting or feeder facilities within the boundaries of a single State; . . ."

* For example, compacts have been entered into between Pennsylvania and New Jersey, establishing the Delaware River Port Authority (see N.J.S.A. 32:3-1, *et seq.* and 36 P.S. § 3503, *et seq.*) and the Delaware River Joint Toll Bridge Commission (see N.J.S.A. 32:8-1, *et seq.* and 36 P.S. § 3401, *et seq.*). These agencies operate the various toll and free bridges crossing the Delaware River between Pennsylvania and New Jersey. Similarly, a compact was entered into between New York and New Jersey establishing the New York-New Jersey Port Authority (see N.J.S.A. 32:1-1, *et seq.* and N. Y. Unconsol. Laws § 6401, *et seq.*), to operate the bridge and tunnels across the Hudson River between New York and New Jersey.

Jersey. Thus, the revenues required to fund these interstate transportation projects are a function of state taxation.

The New Jersey tax structure relies very heavily upon real property taxes* which are among the highest in the nation.** Since real property taxes ordinarily are paid only by residents, nonresidents who commute to New Jersey*** traditionally have not contributed substantially to State revenues even though they partake of the benefits offered by the State to alleviate transportation problems, such as the operation of mass transit buses and trains. The undue reliance upon local real property taxes by New Jersey also has severely restricted the capacity of the State to meet its responsibilities for pro-

* According to the U. S. Bureau of Census, in 1973-74 New Jersey real property taxes accounted for 55.51% of the total tax revenues raised in the State. This was the 2nd highest for any state. For the same year Pennsylvania real property taxes accounted for only 25.03% of the total tax revenue in the state, ranking Pennsylvania 39th. Preliminary figures from the U. S. Department of Commerce, Social & Economic Statistics Administration, Bureau of the Census, "Governmental Finances in 1973-74", 1975 Ed.

** Property tax collections per capita in New Jersey for 1973-74 amounted to $379.23, ranking New Jersey 2nd in the nation. This compares to a figure of $153.93 for Pennsylvania, ranking it 35th in the nation. *Id.*

*** The number of persons who live in Pennsylvania and work in New Jersey is approximately equal to the number of New Jersey residents who work in Pennsylvania. The Delaware Valley Regional Planning Commission, which is established jointly by compact between the States of Pennsylvania and New Jersey (see N.J.S.A. 32:27-1, *et seq.* and 73 P.S. § 701, *et seq.*), reports that 84,600 New Jersey residents work in Pennsylvania and that 63,700 Pennsylvania residents work in New Jersey.

viding vital public services. See *Robinson* v. *Cahill*, 67 N. J. 333, 339 A. 2d 193 (1975). One of the public services which has placed heavy stress upon the fiscal resources of the State has been the transportation of interstate commuters. See *e.g. In re Central R.R.*, 485 F. 2d 208 (3rd Cir. 1973) (en banc) *cert.* den. 411 U. S. 1131 (1974).

In order to provide sufficient funds to help alleviate the transportation crisis between Pennsylvania and New Jersey, the Transportation Benefits Tax was enacted by New Jersey in 1971 (N.J.S.A. 54:8A-58, *et seq.*). This law imposes a tax upon certain income and gains derived by residents of New Jersey from sources within another state and upon income of nonresidents from sources within New Jersey if a "severe transportation problem"* is found to exist. N.J.S.A. 54:8A-61. New Jersey residents receive a credit against the New Jersey tax for income taxes paid to Pennsylvania, and the New Jersey Director of Taxation is empowered to enter into a reciprocal agreement with the Pennsylvania tax department to relieve Pennsylvania residents working in New Jersey from having the tax withheld from their wages and salaries if Pennsylvania grants similar treatment to New Jersey residents. N.J.S.A. 54:8A-101(b). Significantly, all of the Transportation Benefits Tax revenues are paid into a special transportation fund, N.J.S.A. 54:8A-106(a). Other than the costs of administering the tax and for refunds to taxpayers, the Transportation Benefits Tax fund is used exclusively to finance projects and programs to help alleviate the transportation problems between

* This situation has been found by the New Jersey Commissioner of Transportation to exist in the New Jersey-Pennsylvania area requiring the imposition of the Transportation Benefits Tax.

New Jersey and Pennsylvania.* The statute specifically provides that the Transportation Benefits Tax fund may not be used except upon a presentation to the Attorney General of New Jersey itemizing the purpose for which the funds will be used, and the transmittal of such itemization to the State Treasurer "with a certification by the Attorney General endorsed thereon that the purpose for which funds are therein proposed to be used are within the terms and intent of the Act. . . ." N.J.S.A. 54:8A-106(b). If any of the moneys in the transportation fund are not used for one of the purposes specified in the Act, a taxpayer has the right to a refund or credit equal to his *pro rata* share of the fund. N.J.S.A. 54:8A-108.

Subsequent to the enactment of the Transportation Benefits Tax Act, the tax fund has been used for the purposes set forth in the Act. For instance, expenditures amounting to $10 million have been made for improvements to the Lindenwold High Speed Transit Line, which runs from southern New Jersey into Philadelphia, supplemented by almost $10 million for bus feeder service

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* N.J.S.A. 54:8A-106(a)(2) specifically provides that the Transportation Benefits Tax fund is to be used:

> "* * * to defray the cost of, or to provide financing by way of advances, loans or otherwise for, projects and programs to meet transportation problems, whether such transportation be by motor vehicle, by rail or rapid transit, or by any other mode or vehicle of transportation whatever, when such project or program includes the transportation of persons or property interstate, between the State of New Jersey and . . . [Pennsylvania], and for the furnishing of such other facilities, services or other benefits for which the class of taxpayers covered by this act will be the major eligible recipient and for which the tax imposed by this act may reasonably be exacted, as may be authorized by law from time to time."

to the Speed Line. Payments have been made for operating expenses of the Delaware River Joint Toll Bridge Commission, and very substantial amounts have been expended for road construction and improvements along the various highways leading to the bridges across the Delaware River. Thus, the revenues derived from the Transportation Benefits Tax Act have enabled New Jersey to undertake significant public transportation projects, including mass transit programs, for the benefit of interstate commuters.

ARGUMENT

The motion by Pennsylvania for leave to file an original action challenging the constitutionality of the New Jersey Transportation Benefits Tax should be denied, because the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution upon which Pennsylvania relies only may be invoked by individual citizens and not by states.

The Commonwealth of Pennsylvania seeks by the present motion to have the Court exercise its original jurisdiction to determine whether certain tax statutes of the State of New Jersey infringe upon the federal constitutional rights of some residents of Pennsylvania. The proposed complaint also asserts that payment by Pennsylvania residents of the New Jersey tax has resulted in the loss of tax revenues to Pennsylvania, due to the credit provisions of the Pennsylvania tax laws, and it seeks the entry of a money judgment against New Jersey payable directly to Pennsylvania in the amount of all taxes collected from Pennsylvania residents under the New Jersey law.

It is now settled that the Court will exercise its original jurisdiction only where it is clearly shown that resort to this extraordinary form of action is required. In its recent decision in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 93-94 (1972), the Court noted that:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' . . . We construe 28 USC § 1251(a)(1), as we do Art III, § 2, cl 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

See also *Washington* v. *General Motors Corp.*, 406 U. S. 109 (1972).

The Court also has recently reaffirmed its view that disputes over the states' imposition of taxes upon nonresidents ordinarily should not be entertained in an original action. In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 497 (1971), Justice Harlan, speaking for the Court, said:

> "As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. *Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes,* motor vehicles, decedents' estates, business torts, government contracts, and so forth. *It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.*" (Emphasis added.)

The Court's original jurisdiction over claims arising from a state's administration of its tax laws was specifically addressed in *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939), in which Massachusetts was denied leave to file an original complaint against Missouri to obtain a declaration that only Massachusetts could impose an inheritance tax on the estate of a Massachusetts domiciliary who had died with most of his assets in several trusts established in Missouri. The assets located in Massachusetts were insufficient to pay the Massachusetts inheritance taxes, and thus resort to the assets in the Missouri trusts was required to satisfy Massachusetts' tax claim. The Massachusetts statute taxed all trust property when the settlor was a Massachusetts domiciliary and reserved a right of revocation, but it exempted from taxation such property within its state owned by residents of other states. Missouri statutes taxed all trust property within its state in which the settlor had reserved a right of revocation, but they exempted from taxation such property owned by a resident of another state which had a reciprocal exemption provision. The Massachusetts exemption provision apparently met this requirement. Nonetheless, Missouri also asserted the exclusive right to impose its own tax on the property in the revocable trusts.

The Court held that Massachusetts could not invoke the original jurisdiction of the Supreme Court to enjoin Missouri from taxing the property in the trusts established by the decedent Massachusetts domiciliary, holding that

the proposed complaint did not present a justiciable controversy between the two states. It said:

> "To constitute such a controversy, it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence." *Id.* at 15.

The Court concluded that the imposition of taxes upon the trust assets by Missouri would not directly injure Massachusetts, because there was no constitutional bar to the imposition of inheritance taxes by both states and there were sufficient assets in the trusts to satisfy both tax claims. Therefore, the claims of the two states were not "mutually exclusive." Compare *Texas* v. *New Jersey*, 379 U. S. 674 (1965); *Texas* v. *Florida*, 306 U. S. 398 (1939). The Court further concluded that no justiciable controversy was presented by Massachusetts' contention that the Missouri taxing authorities had improperly refused to exempt the assets of the Missouri trusts under the reciprocity provisions of its tax laws, saying:

> "Each State has enacted its legislation according to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation." *Id.* at 16-17.

Finally, the Court held that Massachusetts could not invoke the original jurisdiction of the Supreme Court on behalf of its residents to challenge the imposition of taxes by Missouri. *Id.* at 17.

It is as clear in this case as it was in *Massachusetts* v. *Missouri* that there would be no constitutional bar to both

Pennsylvania and New Jersey taxing the incomes of interstate commuters (*Shaffer* v. *Carter*, 252 U. S. 37 (1920)), and that the taxpayers earn sufficient income to pay both taxes. Consequently, the taxes are not, in the terminology of *Massachusetts* v. *Missouri*, "mutually exclusive". It also is even clearer than in *Massachusetts* v. *Missouri* that the only impediment to the collection by Pennsylvania of income taxes from its residents who work in New Jersey is the credit provision of its own tax laws, which it is free to amend at any time. Therefore, Pennsylvania is not being directly injured by the imposition of the New Jersey tax and it has not ". . . suffered a wrong through the action of [New Jersey], furnishing grounds for judicial redress." 308 U. S. at 15. *Cf. Warth* v. *Seldin*, 45 L. Ed. 2d 343, 360 (1975). Rather, if there is any claim against New Jersey, it is a claim which should be raised by the Pennsylvania residents upon whom the Transportation Benefits Tax has been imposed just as the Court in *Massachusetts* v. *Missouri* left it to the administrator of the estate of the Massachusetts decedent to raise any challenge to the imposition of taxes by Missouri.

The conclusion that the claim over which Pennsylvania seeks to have the Court accept original jurisdiction is in fact the claim of the taxpayers who pay the taxes is reinforced by examining the constitutional contentions advanced by Pennsylvania. Paragraph 13 of the complaint Pennsylvania seeks to file indicates that the bases of its claim are the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. However, it is firmly settled that the constitutional guarantee of these clauses extend to individuals only and not to states. A state is not a "person" entitled to equal protection of the laws under the Fourteenth Amendment (*Wisconsin* v. *Zimmerman*, 205 F. Supp. 673

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(W. D. Wis. 1962); *cf. South Carolina* v. *Katzenbach*, 383 U. S. 301, 323-324 (1966)), nor a "citizen" entitled to the rights of the Privileges and Immunities Clause. *Hague* v. *C.I.O.*, 307 U. S. 496, 514 (1939); *Paul* v. *Virginia*, 75 U. S. 168, 178-180 (1868). Thus, the only cause of action indicated by Pennsylvania's complaint is one personal to the taxpayers who have paid the Transportation Benefits Tax, and it is those taxpayers—not Pennsylvania in an original action—who should be pursing any claim as to the validity of the New Jersey tax either on Privileges and Immunities or Equal Protection grounds. Indeed, it is noteworthy that *Austin* v. *New Hampshire*, 420 U. S. 656 (1975), upon which Pennsylvania so heavily relies on the merits of its claim, was successfully pursued by individual taxpayers, as has every other challenge brought before the Court to the validity of a tax on Privileges and Immunities or Equal Protection grounds. See *e.g. Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949); *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920); *Travellers Insurance Co.* v. *Connecticut*, 185 U. S. 364 (1902); *Ward* v. *Maryland*, 79 U. S. (12 Wall) 418 (1870). There is no reason to doubt that any Pennsylvania resident subject to the New Jersey tax can raise any constitutional claim he may have in the same manner as did the petitioners in *Austin*.* Therefore, whatever the result might be of an

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* The Transportation Benefits Tax (N.J.S.A. 54:8A-114) provides that the State Tax Uniform Procedure Law is applicable and, under the provisions of the latter law, a taxpayer, at any time within two years after the payment of a tax, may file a claim for refund with the Division of Taxation. N.J.S.A. 54:49-14. N.J.S.A. 54:51-1 provides for an appeal to the State Division of Tax Appeals from an adverse decision of the Division of Taxation, such as a denial of

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action brought by a nonresident taxpayer,* it is patently clear that the constitutional provisions cited by Pennsylvania confer no rights upon the states and that Pennsylvania has no cause of action. *Cf. Massachusetts* v. *Missouri, supra; South Carolina* v. *Katzenbach, supra.*

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a refund claim. See also N.J.S.A. 54:2-34. Appeals from an adverse decision of the Division of Tax Appeals may be taken as of right to the Appellate Division of the New Jersey Superior Court. New Jersey Court Rule 2:2-3(a). Also, when the interests of justice dictate, a declaratory judgment action to contest the constitutionality of a tax statute can be instituted in the Law Division of the Superior Court. See, *Roadway Express* v. *Kingsley*, 37 N. J. 136, 179 A. 2d 729 (1962). It should be noted that subsequent to the decision in *Austin* v. *New Hampshire, supra*, some refund applications have been submitted by persons subject to the New Jersey transportation taxes. The Division of Taxation has denied these refund applications on the ground that the New Jersey commuter taxes are different from the New Hampshire statute and, consequently, these refund denials are appealable to the State Division of Tax Appeals.

* It is noteworthy that the brief submitted by Pennsylvania in support of its motion for leave to file complaint does not contain any argument to support its contention that the New Jersey tax is unconstitutional. Rather, it simply cites *Austin* v. *New Hampshire, supra* and then apparently assumes that the New Jersey tax is the same as the New Hampshire tax found to violate the Privileges and Immunities of the appellant taxpayers in *Austin*. In point of fact, there are significant differences between the two taxes. Unlike the New Hampshire tax, the Transportation Benefits Tax is specifically designed to generate revenue for interstate transportation projects which directly benefit the nonresident commuters who pay the tax by making it easier for them to move from state to state. Therefore, the New Jersey tax, rather than discouraging Pennsylvania residents from working or doing business in New Jersey, actually promotes such interstate commerce and thus is fully consistent

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with the policies which underlie the Privileges and Immunities Clause. In *Toomer* v. *Witsell*, *supra*, the Court noted:

> "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.
>
> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." 334 U. S. at 396.

Here, the fair allocation of the costs of interstate transportation projects among those who benefit from the projects would represent a substantial reason for any overall disparity in tax treatment. In addition, New Jersey does not concede that there is any disparity in tax treatment. New Jersey residents are subject to substantial taxes, including local real property taxes, which nonresidents ordinarily are not called upon to pay, and it is New Jersey's position that the Transportation Benefits Tax goes no further than necessary to establish a substantial equality of treatment in taxation between residents and nonresidents. See *Travellers Insurance Co.* v. *Connecticut, supra*. There are thus substantial questions as to the effect of *Austin* v. *New Hampshire* upon the New Jersey Transportation Benefits Tax.

Although the brief in support of the motion for leave to file complaint fails to set forth any argument to support the claim that the New Jersey tax is unconstitutional, it contains an extended discus-

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cusion in support of the thesis that this anticipated judgment "should be applied retroactively". Even ignoring the fact, discussed in the text *infra*, that any claim for a refund of taxes previously paid is a claim personal to the taxpayer, not the State in which the taxpayer resides, Pennsylvania has seriously misconceived the impact of the Court's decisions dealing with retroactivity questions in urging that a judgment should be entered against New Jersey for all taxes collected under the Transportation Benefits Tax from Pennsylvania residents. It is fundamental that a party who desires to challenge the imposition of a tax must make a timely demand for refund or other claim pursuant to the provisions of the applicable tax statute. *Kohn* v. *Central Distributing Co.*, 306 U. S. 531 (1939); *Matthews* v. *Rodgers*, 284 U. S. 521 (1932). If no timely challenge to the imposition of the tax is filed, the taxing authorities are then entitled to rely upon the receipt of those revenues. *Burrill* v. *Locomobile Co.*, 258 U. S. 34 (1922); *Abernathy* v. *Carpenter*, 208 F. Supp. 793 (W. D. Mo. 1962) *aff'd* 373 U. S. 241 (1963); *Henry* v. *Metropolitan Dade County*, 329 F. 2d 780 (5th Cir. 1964). The Court's decisions dealing with the retroactivity of new constitutional holdings do not in any way undermine these principles. Those decisions ordinarily deal with whether new constitutional holdings should apply to administrative or judicial actions that have not become final by virtue of the expiration of the applicable periods of limitations. See *e.g. Lemon* v. *Kurtzman*, 411 U. S. 192 (1973); *City of Phoenix* v. *Kolodzieyski*, 399 U. S. 204 (1970). See also *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295-297 (1970) (Harlan, J., concurring). In any event, this is an issue to be litigated, if necessary, between New Jersey and the Pennsylvania residents who have paid the New Jersey tax, but in no event could it give rise to a claim by Pennsylvania for the direct recovery of taxes paid by its residents.

Finally, if the Court should determine, contrary to the position taken by New Jersey in this brief, that Pennsylvania is authorized to proceed directly against New Jersey in connection with the Transportation Benefits Tax, New Jersey is prepared to prove that before this tax was signed into law in 1971, there were discussions regarding the tax between officials at the highest levels of the governments of the two states and, while no formal agreement was entered into,

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The fact that the constitutional provisions cited by Pennsylvania confer no rights upon the states sharply distinguishes the present case from the boundary dispute (*Nebraska* v. *Iowa*, 406 U. S. 117 (1972); *Louisiana* v. *Mississippi*, 202 U. S. 1 (1906); *Rhode Island* v. *Massachusetts*, 37 U. S. (12 Pet.) 657 (1838); *New Jersey* v. *New York*, 30 U. S. (5 Pet.) 284 (1831)); water diversion (*Arizona* v. *California*, 373 U. S. 546 (1963); *New Jersey* v. *New York*, 345 U. S. 369 (1953); *Colorado* v. *Kansas*, 320 U. S. 383 (1943)) and noxious substances (*North Dakota* v. *Minnesota*, 263 U. S. 365 (1923); *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230 (1907); *Missouri* v. *Illinois*, 180 U. S. 208 (1901)) cases relied upon by Pennsylvania, in which the causes of action were grounded upon federal common law fashioned by the Court in furtherance of the interests of states in protecting their sovereignty and the comfort, health and prosperity of their citizens. See *Illinois* v. *City of Milwaukee*, *supra*, 406 U. S. at 104-108. See also *Wyoming* v. *Colorado*, 286 U. S. 494, 508-509 (1932); *Louisiana* v. *Texas*, 176 U. S. 1, 23-27 (1900) (Harlan, J. concurring). In this case, Pennsylvania does not set forth any cause of action involving its sovereign rights as a state; rather it simply

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Pennsylvania never made any attempt from 1971 to the filing of this motion in July 1975 either to withhold its tax credit from residents who paid the New Jersey tax or to challenge the tax. New Jersey also is prepared to prove that it has spent substantial amounts of revenues collected under the Transportation Benefits Tax Act for interstate transportation projects which have directly benefited the Pennsylvania residents who pay the tax. These obviously are significant equitable considerations that would need to be taken into account in determining whether a judgment of unconstitutionality of the Transportation Benefits Tax Act should be given any retroactive effect.

contends that there has been a violation of constitutional rights personal to its citizens. Therefore, the proposed complaint falls squarely within the line of cases holding that the original jurisdiction of the Court may not be invoked by a State to pursue a cause of action on behalf of its individual citizens. *Massachusetts* v. *Missouri*, *supra*; *Oklahoma ex rel. Johnson* v. *Cook*, 304 U. S. 387 (1938); *Oklahoma* v. *Atchison, T. & S. F. RR Co.*, 220 U. S. 277 (1911); *New Hampshire* v. *Louisiana*, 108 U. S. 76 (1883).

A further indication of the inappropriateness of this matter proceeding as an original action is that the proposed complaint seeks direct relief on behalf of Pennsylvania for which there is clearly no constitutional or statutory authority. Even though the constitutional provisions cited by Pennsylvania afford protection only to individuals and not to states, Pennsylvania nevertheless asks the Court to enter a money judgment directly in its favor against New Jersey. However, if New Jersey has improperly imposed a tax upon residents of Pennsylvania, it is the taxpayers and not the state in which they reside that has a claim against New Jersey. The governing New Jersey statutes and court rules contain express provisions by which a taxpayer may contest the imposition of a tax.* Thus, the nonresident taxpayers have the right, if the Transportation Benefits Tax was improperly imposed, to seek the return of *their* money. If the refund of that money would give rise to an obligation to pay additional taxes to Pennsylvania, either in the form of an amended return for the year in which a credit was claimed for taxes paid to New Jersey or as additional income for the year in which the refund were received, then the taxpayer would have to report that additional

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* See footnote on pp. 12-13, *supra*.

income to Pennsylvania.* However, Pennsylvania should not be permitted to invoke the original jurisdiction of the Court as a device to short-cut the tax collection procedures provided by its own laws.**

The Court also should not permit its original jurisdiction to be invoked as a device to circumvent the anti-tax-injunction statute, which provides that "[t]he district courts shall not enjoin, suspend or restrain the levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. See Hart & Wechsler, The Federal Courts Under the Federal System (2nd ed.) pp.

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* The obligation of the Pennsylvania taxpayer to report that income to Pennsylvania may not be altogether clear as a matter of Pennsylvania law. The Pennsylvania income tax is expressly limited to eight classes of income, none of which includes a tax refund. 72 P.S. § 7303. Thus, if a Pennsylvania resident receives a tax refund from another state, it may not be taxable as income. Moreover, it is unclear whether a taxpayer must file an amended return for the prior years in which he took as a credit the amount of tax paid to another state by virtue of 72 P.S. § 7314(a), inasmuch as that statute is silent as to whether the tax for which the credit is claimed must be lawfully or constitutionally imposed. Pennsylvania thus may be seeking to secure through this original action relief to which it would not be entitled under its own tax laws.

** At the very minimum, the Pennsylvania taxpayers, whose money Pennsylvania seeks, are indispensable parties to this action, since a money judgment in favor of Pennsylvania would bar them from seeking a tax refund from New Jersey. However, Pennsylvania has failed to name the taxpayers as defendants, perhaps because it is clear that their joinder as parties would foreclose the Court from assuming original jurisdiction. *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158 (1922); *California* v. *Southern Pacific Co.*, 157 U. S. 229 (1895).

978-979. Although this statute does not speak directly to the subject of original actions in the Supreme Court, probably because Congress never contemplated the type of action Pennsylvania now seeks to file, it does represent an unmistakable expression of congressional intent that the states ordinarily should be left free to administer their tax laws without being subjected to collateral attacks in the federal courts. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943); see also *Perez* v. *Ledesma*, 401 U. S. 82, 126-128 (1971) (Brennan, J., concurring). Furthermore, this statute is reflective of a long-standing policy of the Court not to entertain direct challenges to the validity of state tax statutes unless resort has first been made to state administrative and judicial remedies. *Toomer* v. *Witsell, supra* at 392; *Matthews* v. *Rodgers, supra.* This well-established congressional and judicial policy of non-intervention in state tax matters would require the denial of relief to Pennsylvania even if its original action were otherwise maintainable. *Cf. Non-Resident Tax Ass'n* v. *Municipality of Philadelphia*, 341 F. Supp. 1135 (D. N. J. 1971), *aff'd* 406 U. S. 951 (1972).

Moreover, the mere fact that the invalidation of the New Jersey tax would increase tax collections by Pennsylvania under its own tax laws does not confer power on Pennsylvania to pursue a constitutional challenge to New Jersey's tax laws on behalf of its residents. *Cf. Florida* v. *Mellon*, 273 U. S. 12 (1927). Credits, exemptions and deductions for taxes paid to other jurisdictions are commonplace in the tax laws of both the federal and state governments. Therefore, a successful constitutional attack upon almost any tax would have some collateral impact upon the taxes collectible by other taxing authorities. That impact, however, is the natural by-product of the credits, exemptions and deductions built

into the tax laws of the other taxing authorities, and it may not be used as a springboard from which to attack the validity of those taxes. The contrary jurisdictional premise upon which Pennsylvania's proposed complaint is grounded would have far-reaching implications. For example, the Internal Revenue Code contains broad exemptions in the estate and income tax provisions for taxes paid to state and local governments. 26 U.S.C. §164, §2011. Does this mean that the federal government can attack the validity of any state or local tax if that might result in an increase in federal tax revenues? Similarly, the amounts paid pursuant to the Louisiana franchise tax sustained by the Court in *Colonial Pipelines Company* v. *Traigle,* 421 U. S. 100 (1975) apparently could be taken as a deduction in the calculation of the net income in the Georgia corporate income tax. 26 Ga. Code Annot., §92-3102. Does this mean Georgia could have challenged the Louisiana tax in an original action before the Supreme Court? Clearly, the recognition of such a jurisdictional foundation for one taxing authority to challenge the validity of the tax laws of another taxing authority would be inconsistent with well-established principles of justiciability reflected in *Massachusetts* v. *Missouri* and *Florida* v. *Mellon.*

It is clear, under these circumstances, that the state which provides a credit for taxes payable to another jurisdiction does not, in the words of *Missouri* v. *Massachusetts, supra,* 308 U. S. at 15, "[suffer] a wrong through the action of the other State, furnishing ground for judicial redress." Rather, "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." *Warth* v. *Seldin, supra* at 354. Here, the only parties with a cognizable complaint under the Equal Protection or Privileges and Immunities Clauses are the non-residents who have paid the New Jersey tax, and the Court therefore should leave it those taxpayers to raise in an appropriate proceeding the issues projected for review by Pennsylvania.

CONCLUSION

It is respectfully submitted for the foregoing reasons that Pennsylvania's motion for leave to file an original action challenging the constitutionality of the New Jersey Transportation Benefits Tax Act should be denied.

Respectfully submitted,

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